Marzila bt Hj Mohamed Zem & Anor v Datin Maimun bt Yunus

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-90–02 OF 2014
SM KOMATHY JC
27 OCTOBER 2014

Land Law — Transfer — Validity of — Deceased aged 94 prior to death executed memorandum of transfer of her whole share in landed property to adopted son's daughters — Whether transferees had satisfied court that deceased understood magnitude of her gift and fact she deprived her only daughter and grandchildren of any interest in the property — Whether evidence did not indicate effect and consequences of transfer fully explained to deceased before she executed transfer — Whether lawyer who prepared transfer documentation and secured deceased's thumbprint not engaged by deceased but by transferees

The defendant's 94 year-old mother ('the deceased') owned a house ('the property') in which her adopted son and his family, including his two children ('the plaintiffs') lived. The house was situated in Kampung Baru, Kuala Lumpur, which was *gazetted* as a Malay Agricultural Settlement in 1899 and managed by the Administration Board of Malay Agricultural Settlement ('MAS') whose endorsement was required before any transfer of land in Kampung Baru could be registered at the land office. At all material times, the deceased and the defendant (who was her only child) co-owned the property holding a three-quarter and one-quarter share in it, respectively. The deceased lived alone in another house and had two care-takers to look after her but after she had a fall, the defendant stayed with her four days in a week. The deceased had two other houses occupying the land on which the property stood and she had tenanted them out and authorised the first plaintiff to collect the rent on her behalf. In a letter to MAS, the second plaintiff stated that the deceased had agreed to give her and the first plaintiff a one-quarter share in the property. The first plaintiff then took the deceased to see two members of the MAS board. The deceased informed them she wanted to transfer her share in the property to the plaintiffs but did not indicate the portion she wanted transferred. The first plaintiff then engaged a lawyer ('Nor Akmar') to attend to the transfer documentation. One Sunday evening, when the deceased was alone, the plaintiffs and Nor Akmar visited the deceased to obtain her consent to transferring her whole share in the property to the plaintiffs and her thumbprint was taken on the transfer form. When the plaintiffs wrote to the defendant to hand over the original title to the property to carry out the transfer, she refused. This resulted in the plaintiffs filing an originating summons ('OS') to declare the transfer form executed by the deceased as valid

and requiring the defendant to hand over the original title for the purpose of carrying out the transfer. The High Court allowed the reliefs sought but the Court of Appeal set aside the decision and ordered the OS to be converted to a writ action for trial. The plaintiffs maintained that the deceased had executed the transfer form with full knowledge of its effect and that the defendant's counterclaim that they should account for all rent they had collected on the deceased's behalf was baseless. The defendant, however, contended that the transfer form was invalid as the deceased did not have the mental capacity to understand the full ramifications of the transfer.

Held, dismissing the claim and allowing the counterclaim:

(1) The understanding required of a transferor who made a gift inter vivos was high in a case where he/she had no other assets or the value of the asset given away as a gift was substantial. That same kind of mental capacity was required in the present case as there was no evidence the deceased had any other assets apart from the property. It was a well-known fact that property prices in Kampung Baru had escalated over the last ten years or so. The transfer of the property to the plaintiffs was a substantial gift for the deceased to have made. The law therefore required that the deceased ought to have had a degree of understanding that was as high as that required for a will to have the capacity to make a gift of this magnitude (see paras 30–31).

(2) The onus was on the plaintiffs to establish that the deceased had the ability to understand, and did understand, that she was making a gift of her entire share in the property to the plaintiffs and that in doing so she would be depriving the defendant and her grandchildren of any interest in the property on her intestacy. The court was not satisfied that that understanding on the part of the deceased was established; that if the deceased had known the effect and consequences of the transfer form, she would have executed it anyway. Therefore, the plaintiffs had not shown that the deceased had the requisite understanding and mental capacity to execute the transfer form (see paras 31, 33 & 35).

(3) The evidence of the plaintiffs and Nor Akmar did not indicate that the full facts were explained to the deceased. Nor Akmar had merely focused on satisfying herself that the deceased was desirous of transferring her whole share to the plaintiffs. There was no explanation given to the deceased on the effect and consequences of the transfer; nor were any questions put to her to ascertain her reasons for wanting to give away her whole share instead of one-quarter share, as she had indicated a few years earlier, to the plaintiffs (see para 32).

(4) Although the courts would not readily upset, on the grounds of lack of mental capacity, a legal document that was prepared by an experienced lawyer, the transfer form in the instant case was not prepared by Nor

Akmar on the instructions of the deceased. She was engaged by the plaintiffs. It would be markedly more difficult to challenge the validity of a transfer form that had been professionally prepared on the instructions of the transferor on the grounds of either lack of mental capacity or want of knowledge and approval. It therefore could not be said that the transfer form in the instant case was prepared by an independent lawyer (see para 34).

[Bahasa Malaysia summary

Ibu defendan yang berumur 94 tahun ('si mati') memiliki sebuah rumah ('hartanah tersebut') yang mana anak angkatnya berserta keluarganya, termasuk dua orang anak ('plaintif-plaintif') tinggal. Rumah tersebut terletak di Kampung Baru, Kuala Lumpur, yang *dirizabkan* sebagai Malay Agricultural Settlement pada tahun 1899 dan diuruskan oleh Lembaga Pentadbiran Malay Agricultural Settlement ('MAS') yang mana pengendorsannya diperlukan sebelum apa-apa pindah milik tanah di Kampung Baru boleh didaftarkan di pejabat tanah. Pada setiap masa material, si mati dan defendan (yang merupakan anak tunggalnya) memiliki bersama pemilikan hartanah dengan masing-masing memiliki tiga-suku dan satu suku bahagian dalamnya. Si mati tinggal bersendirian di rumah lain dan mempunyai dua orang penjaga untuk menjaganya tetapi selepas dia jatuh, defendan tinggal bersamanya selama empat hari dalam seminggu. Si mati mempunyai dia buah lagi rumah di atas tanah di mana hartanah tersebut didirikan dan dia telah menyewakan keduanya dan memberi kebenaran kepada plaintif pertama untuk mengutip sewa bagi pihaknya. Dalam surat kepada MAS, plaintif kedua menyatakan bahawa si mati telah bersetuju untuk memberikan kepadanya dan plaintif pertama satu suku bahagian dalam hartanah tersebut. Plaintif pertama kemudiannya membawa si mati berjumpa dengan dua orang ahli Lembaga MAS. Si mati memaklumkan bahawa dia ingin memindahkan bahagiannya dalam hartanah tersebut kepada plaintif-plaintif tetapi tidak menyatakan bahagian yang ingin dipindahkannya. Plaintif pertama kemudiannya melantik seorang peguam ('Nor Akmar') untuk menyelia dokumentasi pindah milik. Pada satu petang ahad, semasa si mati bersendirian, plaintif-plaintif dan Nor Akmar melawat si mati untuk mendapatkan kebenarannya untuk memindahkan keseluruhan bahagian dalam hartanah tersebut kepada plaintif-plaintif dan cap jarinya diambil pada borang pindah milik. Semasa plaintif-plaintif menulis kepada defendan untuk menyerahkan hak milik asal hartanah tersebut untuk melaksanakan pindah milik tersebut, defendan enggan. Ini menyebabkan plaintif-plaintif memfailkan saman pemula ('SP') untuk mengisytiharkan bahawa borang pindah milik yang dilaksanakan oleh si mati sebagai sah dan memerlukan defendan menyerahkan hak milik asal bagi tujuan melaksanakan pindah milik tersebut. Mahkamah Tinggi membenarkan relief-relief yang dipohon tetapi Mahkamah Rayuan mengenepikan keputusan tersebut dan mengarahkan agar SP ditukar menjadi tindakan writ bagi perbicaraan. Plaintif-plaintif menyatakan bahawa si mati telah melaksanakan

borang pindah milik dengan pengetahuan mengenai kesannya dan bahawa tuntutan balas defendan bahawa mereka perlu mengambil kira kesemua sewa yang dikutip bagi pihak si mati adalah tidak berasas. Walau bagaimanapun, defenden mendakwa bahawa borang pindah milik adalah tidak sah kerana si mati tidak mempunyai kapasiti mental untuk memahami kesan penuh pindah milik tersebut.

Diputuskan, menolak tuntutan dan membenarkan tuntutan balas:

(1) Pemahaman yang dikehendaki daripada seseorang pemindah yang membuat hadiah secara inter vivos melalui wasiat adalah tinggi dalam hal di mana dia tidak mempunyai aset-aset lain atau sekiranya nilai aset yang diberikan sebagai hadiah adalah besar. Keupayaan mental yang sama diperlukan dalam kes ini kerana tidak ada bukti si mati mempunyai apa-apa aset lain selain daripada hartanah ini. Ia adalah satu fakta yang diketahui ramai bahawa harga hartanah di Kampung Baru telah meningkat sejak sepuluh tahun lepas. Pindah milik harta tersebut kepada plaintif adalah satu hadiah besar yang dibuat oleh si mati. Undang-undang, dengan itu, memerlukan agar si mati mempunyai tahap pemahaman tinggi yang diperlukan seperti yang diperlukan untuk wasiat bagi mempunyai kapasiti untuk membuat hadiah sebesar ini (lihat perenggan 30–31).

(2) Tanggungjawab terletak pada plaintif untuk membuktikan bahawa si mati mempunyai keupayaan untuk memahami dan sememangnya faham bahawa dia telah membuat hadiah keseluruhan bahagian miliknya dalam hartanah tersebut kepada plaintif dan bahawa dengan berbuat demikian dia akan menafikan defendan dan beliau cucunya daripada apa-apa kepentingan ke atas harta tersebut dengan kematiannya yang tidak berwasiat. Mahkamah tidak berpuas hati bahawa pemahaman di pihak si mati telah berjaya dibuktikan; bahawa sekiranya si mati sudah mengetahui kesan dan akibat pindah milik tersebut, dia tetap akan melaksanakannya juga. Oleh itu, plaintif-plaintif tidak menunjukkan bahawa si mati mempunyai pemahaman yang diperlukan dan keupayaan mental untuk melaksanakan borang pindah milik (lihat perenggan 31, 33 & 35).

(3) Keterangan plaintif dan Nor Akmar tidak menunjukkan bahawa fakta-fakta penuh telah dijelaskan kepada si mati. Nor Akmar sekadar menumpukan pada memuaskan dirinya sendiri bahawa si mati berhasrat untuk memindahkan keseluruhan bahagiannya kepada plaintif. Tiada penjelasan yang diberikan kepada si mati tentang kesan dan akibat pindah milik tersebut; dan tidak mendapat apa-apa soalan yang dikemukakan kepadanya untuk menentukan sebab-sebab mengapa dia ingin memberikan seluruh bahagiannya bukannya satu suku bahagian, seperti yang dinyatakan oleh si mati beberapa tahun terdahulu kepada

plaintif-plaintif (lihat perenggan 32).

(4) Walaupun mahkamah tidak terkilan, atas alasan kekurangan kapasiti mental, dokumen undang-undang yang telah disediakan oleh peguam berpengalaman, borang pindah milik dalam kes ini tidak disediakan oleh Nor Akmar atas arahan si mati. Nor Akmar telah dilantik oleh plaintif. Ia menjadi ketara lebih sukar untuk mencabar kesahihan satu borang pindah milik yang telah disediakan secara profesional atas arahan pemindah atas alasan sama ada kekurangan kapasiti mental atau keperluan pengetahuan dan kelulusan. Oleh itu tidak boleh dikatakan bahawa bentuk pindah milik dalam kes ini telah disediakan oleh seorang peguam bebas (lihat perenggan 34).]]]

Notes

For cases on validity of transfer, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 5751–5759.

Cases referred to

Beaney (deceased), Re [1978] 2 All ER 595; [1978] 1 WLR 770, Ch D (refd)
Gibbons v Wright (1954) 91 CLR 423, HC (refd)

Nor Akmar bt Shamsuddin (Dayang Nutfatriah bt Munir Nurhayati Juha and Zakiah Mohammed with her) (Akmar & Co) for the plaintiff.
Ashokvijay J Sanghrajka (Leela A Sanghrajka & Assoc) for the respondent.

SM Komathy JC:

[1] This case concerns the validity of a memorandum of transfer ('transfer form') executed by the defendant's late mother (hereinafter referred to as 'the deceased'), aged 94, some two weeks before she passed away. By the transfer form, the deceased transferred her interest in a property to the two plaintiffs, who were the daughters of her adopted son. The question raised for consideration is whether at the material time, the deceased had the mental capacity required by the law to execute a transfer form.

[2] Before I turn to consider this issue, it is appropriate first to outline the circumstances which have prompted these proceedings.

THE FACTS

[3] The defendant is the only child of the deceased, Puan Safiah bt Hj Ibrahim and her husband. The deceased and her husband adopted the plaintiff's father when he was still a baby and lived with the deceased and her family even after his marriage and became a father of two children. Sometime

in 1984, he and his family moved out and went to live in a house in Kampung Baru ('the Kampung Baru house'), Kuala Lumpur, which belonged to the deceased.

[4] The Kampung Baru house is the subject matter of the transfer form executed by the deceased. It is held under No HS(D) 83442, No PT 140B, Seksyen 41, Bandar Kuala Lumpur , Daerah Kuala Lumpur, bearing postal address No 36, Jalan Raja Uda, Kampung Baru 50300 Kuala Lumpur ('the Kampung Baru land').

[5] At all material times, the defendant and the deceased were the co-owners and had a 1/4 and 1/3 share, respectively, in the Kampung Baru land. Kampung Baru is a Malay enclave in the heart of Kuala Lumpur, Malaysia and was *gazetted* by the British Government as a Malay Agricultural Settlement in 1899 to allow Malays to retain their village lifestyle within the city. It was and still is managed by the Administration Board of Malay Agricultural Settlement ('MAS') which was set up to in 1900 to administer the affairs of the residents therein. The land in Kampung Baru can only be owned by Malays and any transfer of land required the endorsement of MAS to facilitate the registration of the transfer at the land office.

[6] In 2012, after the demise of her husband, the deceased lived alone at No 10, Jalan Pawang, Keramat Hujung, Kuala Lumpur. She relied on two care takers, Mogan and his wife, to look after her. The defendant stayed with the deceased on and off as she had her own family in Nilai. Sometime in June 2012, the deceased had a fall in the house and injured herself. This prompted the defendant to stay with her mother four days a week, from Wednesdays to Saturdays. The defendant's daughter who lived next door, took over the responsibility of caring for the deceased in her absence.

[7] The two plaintiffs maintained a good relationship with the deceased even after they had moved to the Kampung Baru house. The deceased had two other houses on her Kampung Baru land, which she had tenanted out. She authorised the first plaintiff to collect the rent on her behalf. The plaintiffs visited the deceased regularly to hand over the rent and the deceased relied on the first plaintiff to drive her to the bank, as and when she needed to do a banking transaction.

[8] By an undated letter, the second plaintiff informed MAS that the deceased had agreed to give her and the first plaintiff one quarter share in the Kampung Baru land. The letter was received by MAS on 6 December 2010. The material portions of the letter read:

Perkara di atas dirujuk.

1. Adalah dimaklumkan bahawa pemegang bahagian Puan Hjh. Safiah Binti Hj. Ibrahim (No. K/P: 1157330) beralamat di No. 10, Jalan Pawang, Off Jalan Padang Tembak, 54000 Kuala Lumpur, telah menurunkan 4 daripada 16 bahagian kepada:

Nama	No. Kad Pengenalan	Tarikh Lahir
a) Marzila Binti Hj. Mohammed Zem		
b) Marzida Binti Hj. Mohammed Zem		

2. Bersama ini saya lampirkan salinan surat Puan Hjh. Safiah Binti Hj. Ibrahim untuk tindakan selanjutnya oleh pihaktuan.

3. Saya memohon jika ada apa-apa pertanyaan/perbicaraan pusaka mengenai kedudukan surat ini, saya dan kakak saya ingin menyertai perbincangan/mesyuarat tersebut bersama menyelesaikan pembahagian harta pusaka.

[9] On 3 January 2011, the first plaintiff took the deceased to see one Zakaria bin Abu Kassim ('Zakaria') and Mohamed Sulong bin Abdul Kadir ('Sulong') regarding the Kampung Baru house. The two gentlemen were both board members of MAS. The deceased informed Zakaria and Sulong that she wanted to transfer her share in the Kampung Baru house to both the plaintiffs. She did not specifically mention the portion she wanted to transfer to the plaintiffs.

[10] Zakaria then advised the first plaintiff to engage a lawyer to do the documentation work and gave her the contact number of one Puan Nor Akmar bt Shamsuddin, ('Nor Akmar') an advocate and solicitor. Nor Akmar was known to him as she had done a fair bit of legal work for MAS in the past. The plaintiff's then contacted and engaged her to do the legal documentation for the transfer. Sometime in late June or early July 2012, the first plaintiff and Nor Akmar approached Zakaria to obtain his guidance as to how to deal with Malay Settlement land.

[11] On the evening of 8 July 2012 , a Sunday, the two plaintiffs together with their lawyer, Nor Akmar visited the deceased at her home to obtain her consent and thumbprint on the transfer form. The deceased was alone as both her caretakers had gone out that evening. Nor Akmar and the plaintiffs explained to her the contents of the transfer form and sought her confirmation that she was desirous of transferring her 3/4 share in the Kampung Baru land to the two plaintiffs. After securing the confirmation of the deceased, Nor Akmar requested her to affix her thumprint on the transfer form to signify her consent to transfer her 3/4 share in the Kampung Baru land to the plaintiffs.

[12] The plaintiffs then through their solicitors wrote to the defendant requesting for the original land title that was in her possession be delivered to

them to enable the transfer form to be presented for registration at the land office. The defendant refused. Whereupon, the plaintiffs instituted this action by originating summons seeking a declaration that the transfer form executed by the deceased was valid, and for a further order requiring the defendant to release the original land title to them so that the same could be presented together with the transfer form for registration at the land office.

[13] The High Court allowed the application and declared the transfer form valid. But, on appeal, the said order was set aside by the Court of Appeal and the originating summons was directed to be converted into a writ action. Thereafter, directions were given and the parties exchanged pleadings. By her counterclaim, the defendant claimed for the payment of the rent collected by the plaintiffs in relation to the two other houses on the Kampung Baru land.

THE PLAINTIFF'S CASE

[14] The plaintiffs maintained that the transfer form was valid as the deceased was alert and understood the contents and the legal effect of the transfer form she had executed. The counterclaim was therefore baseless.

THE DEFENDANT'S CASE

[15] On the other hand, the defendants took the position that the deceased was senile at the material time and lacked the requisite mental capacity needed to execute a transfer form. The transfer form was consequently invalid and the plaintiffs must consequently account for all rent collected on behalf of the deceased.

THE ISSUE

[16] As noted in the beginning of this judgment, the singular issue in this case is whether the deceased had the mental capacity to understand the contents and the legal effect of the transfer form she had executed.

WITNESSES

[17] The two plaintiffs testified on their own behalves and called four witnesses. They called their mother Mariah bt Dali, Zakaria, Sulong and Nor Akmar. The defendant too gave evidence in support of her case and called two witnesses; her caretaker Mogan and Dr Nursyuhaida bt Mohamad Nazri. Dr Nursyuhaida was the GP who had last treated the deceased at the government clinic in Klinik Kesihatan Dato Keramat, Jalan Jelatek, Kuala Lumpur in June 2012.

[18] The evidence on the mental health of the deceased was in acute conflict. According to Nor Akmar, the deceased was alert and understood and approved the contents of the transfer form when the same was explained to her in Bahasa Malaysia and in the Urdu language. In this regard, Nor Akmar explained:

> Si Mati dalam keadaan waras akal fikirannya, mengenali Plaintif-plaintif dan memahami akan dokumen yang hendak ditandatanganinya setelah diterangkan oleh saya kepadanya satu persatu dan bersetuju untuk saya menyediakan dokumen tersebut untuk ditandatangani oleh beliau. Walaupun beliau sudah tua, beliau sememangnya memahami akan dokumen yang hendak ditandatanganinya dan telah menandatanganinya secara menurunkan cap jarinya dengan penuh rela dan tanpa dipaksa oleh sesiapapun.

[19] On the other hand, the defendant who was suffering from advanced cancer at the time she gave evidence, testified that the deceased was frail, weak and was suffering from memory loss at the material time. Under cross-examination, the defendant, however, admitted that the deceased had stated to her that she wanted to give the two plaintiffs a share in the Kampung Baru land. The defendant further accepted that it was for this reason that no police report was lodged against the plaintiffs when she found about the transfer form.

[20] According to Mogan, the deceased was unwell at material times and had difficulty in hearing and understanding what was said to her. He added that her condition deteriorated after she sustained a fall at home sometime in mid-June. She was not able to speak or move. When he was cross-examined on this aspect of his evidence, he explained:

Q:	Ok you balik rumah ok, hari itu hari Ahad ya setuju ya. Ok sebagai seorang Penjaga yang you kata kononnya Hajah Safiah ini sakit, tidak boleh bergerak, tidak boleh bangun, tidak boleh bercakap, tidak boleh lihat, tidak boleh mendengar, kenapa you tinggalkan dia sorang-sorang masa itu?
A:	Pasal dia tidak boleh bangun, dia tak boleh makan, kita tahu, pergi balik dua jam baru ...
Q:	Soalan saya jawab, kenapa you tinggalkan dia seorang diri pada masa itu?
A:	Semasa kami pergi, kami beritahu cucu Hajah Safiah.
Q:	Encik Mogan, tadi you jawab dekat I, you akan bergilir dengan isteri you, betul?
A:	Betul.
Q:	Sekarang ini kenapa pada hari itu, dua-dua keluar, semua keluar?
A:	Pasal dia confirm tidak boleh bangun kita tahu. Kita simpan barang, saya ...

[21] The evidence given by the defendant and Mogan on the inability of the deceased to communicate and understand things is seriously undermined by the testimony of Dr Nursyuhaida who, it will be recalled, had examined the deceased in early June 2012. This was two weeks before the deceased passed away. According to the doctor, the deceased had no difficulty understanding her and was able to answer questions put to her. The doctor also testified that she had attended to the deceased at the clinic on three different occasions and encountered no problems in communicating directly with the latter. The doctor's evidence has the inestimable advantage of being that of the patient's GP and of being more or less contemporaneous with the execution of the transfer form. Her evidence does not indicate that the deceased was senile as alleged by the defendant. The fact that the deceased required the plaintiffs to account for all rental collected from her tenants is additional evidence that rules out senility.

[22] As for the condition of the deceased after her fall, I do not accept Mogan's evidence that the deceased could not speak or move thereafter. If indeed the injuries had been serious, it is improbable that the deceased would not have been taken to the hospital. The fact that she was not taken to the hospital indicates to me, it was not as serious as alleged by Mogan. I accept the evidence of Nor Akmar that on the day the deceased signed the transfer form, she was rational and able to understand and communicate with her albeit with difficulty. On the evidence, I am not satisfied that the fall impaired her ability to communicate and understand things said to her.

DISCUSSION

[23] The essential undisputed facts are that deceased was aged 94 at the time she affixed her thumbprint on the transfer form. She was blind in the right eye and had blurred vision in the other eye. She wore a hearing aid because of her hearing difficulty.

[24] There is no evidence to suggest that the deceased was suffering from any weakness of mind or any form of senile or other mental decay or that her sense of judgment was impaired in any way. It is true that the deceased had little vision, but on the evidence, I am satisfied that the deceased had the ability to understand matters when explained to her.

[25] I accept Nor Akmar's evidence that she had explained the contents of the transfer form to the deceased and sought her confirmation that she was desirous to give her 3/4 share in the Kampung Baru land to the plaintiffs. I further accept her evidence, that she had requested the deceased to put her thumbprint on the transfer form only after ensuring that the latter understood that her 3/4 share was given to the plaintiffs. In any event, it is not seriously

challenged by the defendant that the contents of the transfer form were explained to the deceased by Nor Akmar prior to its execution.

[26] It is common ground that the law permits a person to make a gift or disposition of his property. This means that a person can make a valid gift or disposition even if he is old or infirm and even if the terms of the disposition may be unfair to his beneficiaries. The basic legal requirements for validity is that the person has the mental capacity of understanding what he is doing when he makes his gift.

[27] The question of what is the mental capacity that is required to execute documents has received judicial consideration in many cases. The High Court of Australia in *Gibbons v Wright* (1954) 91 CLR 423 at p 438 observed:

> mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.

[28] In *Re Beaney (deceased)* [1978] 2 All ER 595; [1978] 1 WLR 770, the salient facts were these. X, a widow, had three grown-up children, a son, P, and two daughters, V and G. She had her own house. In 1971 her mental condition deteriorated considerably and V, who was unmarried, went to live with her so that she could look after her. All three children were on good terms with X, and P and G, who were both married, visited her regularly. On 7 May 1973 she was admitted to hospital. She was then in an advanced state of senile dementia. V was anxious that the house should be transferred into V's name so that, if necessary, it could be sold, or otherwise dealt with, to make provision for X's maintenance. She raised the matter with X who, she said, assented to the suggestion. On 16 May, V, X's solicitor and a family friend, took to the hospital, for X's signature, a deed transferring the house to V. The house was the only asset of any value which X possessed. The solicitor explained to X that if she executed the deed she would be giving the house to V absolutely, and asked her whether she understood what would happen and whether that was what she wanted. She answered in the affirmative and signed the deed. The solicitor however did not inform her that the effect of the deed would be to deprive P and G of any real interest in her estate. P and G knew nothing of the deed of transfer until X died intestate a year later. As the administrators of her estate, they brought an action against V, claiming, inter alia, a declaration that the deed was void and of no effect.

[29] Mr Martin Nourse QC, sitting as a deputy judge of the High Court, held that the gift inter vivos made by X to one of her children alone of her only asset of value, at a time when she was in an advanced state of senile dementia, was void because the claims of the donee's siblings and the extent of the

property to be disposed of were not explained to her. He stated:

> In the circumstances, it seems to me that the law is this. The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject-matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. *But at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.* (Emphasis added.)

[30] The case illustrates that the understanding required of a transferor who makes a gift inter vivos is high in a case where he has no other assets or the value of the asset given away as a gift is substantial. In my view, the same kind of mental capacity is required in the present case as there is no evidence that the deceased had any other assets apart from the Kampung Baru land. In addition, it is a well known fact that property prices in Kampung Baru have escalated over the last ten years or so because of its proximity to the Petronas Twin Towers. The transfer of the Kampung Baru land to the plaintiff's was therefore a substantial gift for the deceased, a lady of advanced years, to have made.

[31] The law therefore requires that the deceased must have a degree of understanding that is as high as that required for a will for a person to have the capacity to make a gift of this magnitude. The onus is on the plaintiffs to establish that the deceased had the ability to understand and understood that she was making a gift of her entire share in the said land to the plaintiffs, and in doing so she would deprive the defendant and her grandchildren of any interest in the Kampung Baru land on her intestacy.

[32] I now turn to the evidence to ascertain if the deceased had this understanding at the time she executed the transfer form. The evidence of the plaintiffs and Nor Akmar does not indicate that this these facts were explained to the deceased. Nor Akmar had merely focussed on satisfying herself that the deceased was desirous to transfer her 3/4 share to the plaintiffs. There was no explanation given to the deceased on the effect and consequences of the transfer. Nor were any questions put to her to ascertain her reasons for wanting to give 3/4 instead of 1/4 share as she had indicated a few years ago to the plaintiffs.

[33] All in all, I am not satisfied that it has been established that the deceased had the necessary understanding that the transfer had the effect of depriving the defendant and her children of their share to the Kampung Baru land. In

these circumstances, it cannot be said that the plaintiffs have shown that the deceased had the requisite understanding and mental capacity to execute the transfer form.

[34] I accept that courts would not readily upset, on the grounds of lack of mental capacity, a legal document that has been prepared by an experienced independent lawyer. Nor Akmar is an experienced lawyer in conveyancing matters. There is no doubt about it. However, the transfer form in the instant case was not prepared by her on the instructions of the deceased. She was engaged by the plaintiffs. In the case of a transfer form that has been professionally prepared on instructions of the transferor, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval. It cannot therefore be said that the transfer form was prepared by an independent lawyer.

CONCLUSION

[35] All in all, I am not satisfied that it has been established that if the deceased had known the effect and consequences of the transfer form, she would have executed it anyway. However, it must be mentioned, that there is clear evidence that the deceased had intended the plaintiffs, her two granddaughters, to inherit a portion of her share in the Kampung Baru land. I have considerable sympathy with the position of the plaintiffs. But, this is a court of law and matters are decided according to law, which does not always coincide with conscience.

[36] For the reasons given, I am constrained to dismiss the plaintiffs claim and allow the defendant's counterclaim. I make no order as to costs.

Claim dismissed and counterclaim allowed.

Reported by Ashok Kumar